



**Montana Department of Natural Resources and Conservation
(DNRC)
Water Resources Division**

The Bean Lake III Decision: The Implications

In recent weeks, a Montana Supreme Court decision has been much in the news and discussed in private and public forums. This decision, commonly called the *Bean Lake III* decision, has been critiqued for the far-reaching impact it is purported to have upon our existing water rights system. As the agency with state water rights responsibilities, the Department of Natural Resources and Conservation (DNRC) would like to help provide some context and clarify certain facts about the practical implications of the case.

The Court focused on whether the instream or inlake water rights for fish, wildlife or recreation that have already been filed could proceed in the ongoing Montana Water Court general water rights adjudication, or should they be dismissed because of the lack of a diversion, impoundment, or “capture” of the water. The issue was not whether such instream flow rights for fish and recreation are superior to all other water rights, or whether any such new “senior” rights should be established.

The Prior Appropriation Doctrine, which has been in place in Montana since 1865, continues to be the law in the adjudication and administration of water rights today. The Court's decision is based on this doctrine. The Prior Appropriation Doctrine is not a preference system, which provides that certain types of water uses are superior to others. The doctrine and the ruling are based simply on “first in time is first in right” regardless of the purpose of the use. Therefore, the ruling **did not** take away any existing water rights. Any instream or inlake rights that are ultimately recognized by the Water Court will carry a priority date, and will be administered according to that priority date just like any diversionary water right. .

In the *Bean Lake III* decision the Court found that fish, wildlife and recreation claims with a diversion could be valid. It also found that claims where no diversion is physically necessary, such as fish, wildlife and recreation claims and stock watering claims, can also be valid “when the facts and circumstances indicate that notice of the appropriator’s intent has been given.”

The potential impacts that result from this decision are summarized below.

Claim Type	Total Claims
Total Claims	220, 000+
Purpose = Fish, Wildlife or Recreation	13, 415
Physical Means of Diversion or Impoundment	9,185
No Physical Means of Diversion or Impoundment	4,230
Direct From Source Wildlife	3,510
BLM	3,270
Other "Instream Flow"	720
Private	422
Federal	145
State	153
Board of Land Commissioners	2
DFWP	151
Murphy Rights	106
Other DFWP	45

Of the total 220,000+ claims that were filed statewide, 13,415 claimed some type of fish, wildlife, or recreational purpose. Of those, 9,185 identified some type of physical diversion, impoundment, or capture of the water, such as by dams or ditches or pipelines. Most of the remaining 4,230 claims have not yet been examined by the DNRC. Often, examination of these claims and further discussions with the claimants reveals that there was some physical manipulation of the water, such as a spring development, dam, or excavation that was not reported on the original claim form. Therefore, number of actual "instream flow" claims will eventually be less than 4,000.

In fact, 3,510 of those 4,230 claims identify wildlife drinking "directly from source" and may be overlapping with instream livestock watering rights. Most of these were filed by the U.S. Bureau of Land Management (BLM) in north central and northeastern Montana for water out of small pits and some natural potholes. That leaves a total of 720 claims that may be equated as "typical" for instream flows or inlake water levels. Four hundred twenty-two of the 720 real instream flow claims were filed by private parties, which are questionable because language in the statutes as well *Bean Lake* /// decision appears to limit who could file these types of water right claims to the Montana Department of Fish, Wildlife and Parks (DFWP), and possibly federal agencies. That leaves 298 government instream and inlake claims, of which 106 are based on the "Murphy Rights" established by the legislature in the late 1960s.

If you recall, Murphy Rights are the water rights created by the Legislature with early-1970's priority dates to protect in-stream flows for fisheries on twelve of Montana's most pristine blue ribbon rivers. Those twelve streams being Big Spring and Rock Creeks, the Blackfoot, Gallatin, Madison, Smith, Upper Missouri, Upper Yellowstone, and Flathead Rivers, and the North, South and Middle Forks of the Flathead.

The remaining 192 claims may have been granted new life by the *Bean Lake III* decision. A quick review of 45 of those filed by the DFWP shows that three relatively large rivers are involved, including the Bighorn below Yellowtail Dam, the Beaverhead below Clark Canyon Dam, and the Bitterroot River. In the case of the Bighorn and Beaverhead, the rights may be associated with the creation of the federal dams and are therefore associated with “diversions.” In other cases, the DFWP claims appear to be mostly associated with high mountain lakes, fish trap stations, lakes or springs on wildlife management areas, and most of the lakes in the Blackfoot and Clearwater River drainage. These all claim fairly recent priority dates, and therefore have little potential for affecting most senior water rights. Similarly, most of the claims filed by the federal government are for areas on Forest Service land upstream of private lands and diversions.

The *Bean Lake III* decision also requires the claimants to prove that these water rights met other requirements. It will not be enough to show that the water was used for fish, wildlife or recreation. The claimant will have to prove there was an actual **intent to develop a water right** for these purposes. It is a common requirement under the Prior Appropriation Doctrine that other water users would have been provided notice of the intent and the opportunity to seek legal recourse for adverse effects caused by the creation of new water rights. Proving this intent may not be easy.

There will be some instances where these instream flow claims will result in some reduction in the amount of water available for some junior water right holders.

The *Bean Lake III* decision also provides a very positive benefit for stockmen. For the first time since 1865, the Montana Supreme Court has made a clear statement that stock drinking from a stream establishes a water right without the need for a manmade diversion. Because the adjudication process exempts claims for existing rights for livestock based upon instream flow, the livestock water rights have not been forfeited as have all other unclaimed instream fish, wildlife and recreation uses.

The decision may also have implications to future water policy. But this decision does not pose the type of general, statewide threat to the ongoing statewide adjudication, or all existing water rights, as may be feared. We need to keep these facts in context as we attempt to deal with changing and increasing demands for historic, new and varied water uses.



(Nov.02)